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June 20, 1994

Mr. William F. Caton
Acting Secretary,
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20554

Via Messenger

Re: **GN Docket No. 93-252**
Implementation of Sections 3(n) and 332
of the Communications Act
Regulatory Treatment of Mobile Services

Dear Mr. Caton:

Submitted herewith on behalf of SMR Systems, Inc. are an original plus five (5) copies of its Comments with respect to the above-referenced docket.

Kindly contact my office directly with any questions concerning this submission.

Respectfully submitted,

William J. Franklin
Attorney for SMR Systems, Inc.

Encs.
cc: SMR Systems, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	**GN Docket No. 93-252**
	)	
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

COMMENTS OF
SMR SYSTEMS INC.

SMR Systems, Inc. ("SSI"), by its attorney and pursuant to Section 1.415(b) of the Commission's Rules, hereby files Comments with respect to the Further Notice of Proposed Rulemaking adopted in the above-captioned proceeding.[1/] SSI urges the Commission to be sensitive to the specific technical, economic, and regulatory constraints of small businesses, and to adopt rules which foster their growth.

INTEREST OF SSI

SSI is a licensee under Part 22 of the Commission's Rules, holding several PLMS licenses to provide paging and two-way mobile service in the Houston and Austin, Texas areas. SSI's principals have extensive experience in the mobile-radio business. SSI filed Comments with respect to the original Notice of Proposed Rulemaking in the Commission's revision to Part 22 of

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[1/] 9 FCC Rcd ____ (FCC 94-100, released May 20, 1994) ("FNPRM").

the Rules.[2/] Concurrently herewith, SSI is also filing Comments with respect to the Commission's Further Notice of Proposed Rulemaking in the Part 22 proceeding.[3/] Accordingly, SSI is qualified to provide comments to the Commission on the proposed CMRS rules and policies as they affect the smaller carrier.

I. THE COMMISSION MUST MODIFY ITS PROPOSED DEFINITION OF "MAJOR AMENDMENT" AND "MODIFICATION TO AN EXISTING LICENSE" TO REFLECT EXISTING TECHNICAL AND COMMISSION PRACTICES.

Paragraph 131 of the FNPRM proposes to adopt the definition of "major modification" amendments which the Commission initially proposed for common-carrier 931 MHz paging applications, i.e., an amendment is a major modification to an existing application only if (a) it is for the same frequency as currently proposed, and (b) if it involves a relocation, it proposes a new site 2 kilometers (or 1.6 miles)[4/] or less from the currently proposed site.[5/]

Paragraph 132 of the FNPRM proposes to apply this definition of "major modification" to determine when an application is a modification to an existing station, i.e., is not subject to the Commission's auction authority. In this context, SSI notes that

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[2/] Revision of Part 22, 7 FCC Rcd 3658 (1992) (Notice of Proposed Rulemaking) ("Part 22 Rewrite Notice").

[3/] Revision of Part 22, 9 FCC Rcd ____ (FCC 94-102, released May 20, 1994) (Further Notice of Proposed Rulemaking) ("Part 22 Further Notice").

[4/] As a threshold matter, the Commission's kilometer-to-mile conversion is incorrect: 2 kilometers is 1.24 miles; 1.6 miles is roughly 2.6 kilometers. Thus, the Commission's proposal is internally inconsistent and requires clarification.

[5/] FNPRM, ¶131, citing Part 22 Rewrite, supra, ¶18.

the Commission failed to restate in the FNPRM the criteria proposed in the Part 22 Further Notice (at ¶18) to determine a modification application, i.e., an application is a modification to an existing station only if (a) it proposes new locations 2 kilometers (or 1.6 miles) or less from a previously authorized and fully operational base station licensed to the same licensee on the same frequency, (b) it to relocate an authorized site to a new location 2 kilometers (or 1.6 miles) or less from the current site, or (c) the application seeks a technical change that would not increase the service contour.

SSI supports the Commission's proposal to use the same criteria, subject to specific exceptions noted below, to determine major amendments and modifications to licensees. However, in several important respects, the specific proposals advanced by the Commission are far too rigid and do not serve the public interest.

First, the Commission's proposal is substantially irrelevant for area-licensed CMRS services, such as cellular, narrowband and broadband PCS, regional and national paging, and nationwide 220 MHz CMRS. If the Commission further adopts area licensing for other Part 22 services,[6/] then such criteria would apply there as well. The Commission needs to propose a different set of criteria for area-licensed services.

[6/] Cf. FNPRM, ¶37.

Second, the Commission's use of a 2-kilometer radius (or the 1.6 mile/2.6 kilometer radius) to determine when an application is a license modification is far too small. This will work a substantial hardship on licensees, especially on smaller businesses who do not have the resources to develop new tower sites merely to maintain the 2- (or 2.6-) kilometer spacing.

For each service, the Commission should use a distance roughly twice the expected reliable service contour for base station licensed at maximum height and power as the maximum distance under which a new application is deemed to be modifying an existing license.

Specifically, SSI suggests the following maximum spacing between existing and proposed stations be allowed for modifications to existing stations:

CMRS Service	Authority	Maximum Mod. Distance	
		Km	Miles
35-43 MHz Paging	Part 22	64	40
152 MHz Two-Way	Part 22	84	52.5
152 MHz Paging	Part 22	64	40
220 MHz SMR	Part 90[7/]	90	56
450 MHz Two-Way	Part 22	62	38.4
800 MHz SMR	Part 90[8/]	64	40

7/ The Commission's Report and Order in its 220 MHz rulemaking establishes a 45 kilometer (28 mile) service contour at 220 MHz. 220 MHz Band, 6 FCC Rcd 2356, 2371 (1991).

8/ The Commission has determined that the 800 Mhz service contour was 32 kilometers (20 miles). See 800 MHz Short Spacing, 8 FCC Rcd 7293, 7294 (1993).

CMRS Service	Authority	Maximum Mod. Distance	
		Km	Miles
900 MHz SMR	Part 90[9/]	64	40
931 MHz Paging	Pts 22 & 90	64	40

As this table shows, if the Commission seeks to use a single maximum for all services, then the 64 kilometer (40 mile) distance will provide reasonable assistance to all licensees in building wide-area, site-licensed communications systems.

This situation is one in which major-amendment and license-modification criteria should differ. For amendments, the Commission should keep the maximum relocation distance at 2 (or 2.6) kilometers, so that applicants cannot move their proposed sites without reappearing on public notice. However, modification applications will always appear on public notice, so this concern is irrelevant. In accord with existing Part 22 practice, the Commission's concern should be that the existing and proposed sites can be operated as an integrated system. This concern is met when the predicted, reliable service contours for the existing and proposed sites can touch.

Third, for two-way stations (150 MHz IMTS, 220 MHz SMR, 450 MHz IMTS, 800 MHz SMR, and 900 MHz SMR), the Commission's "same frequency" criteria lacks a valid technical justification. The

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[9/] The Commission similarly has determined that the 900 Mhz service contour was 32 kilometers (20 miles). See 900 MHz SMR Licensing, 8 FCC Rcd 1469, 1478 (1993) (First Report and Order and Further Notice of Proposed Rulemaking) ("900 MHz Phase II Notice").

Commission's proposal (from the Part 22 Further Notice) was developed in the context of 931 MHz paging, in which all transmitters comprising a single system use the same frequency, with simulcasting. But for two-way systems, the criteria needs to be relaxed to say "a frequency in the same frequency band which can be used for the same purposes."

Fourth, the Commission's "same licensee" criteria in determining when applications are proposing modifications to authorizations (rather than a new station) is too rigid. Currently, the Commission's Part 22 practice is to deem commonly owned stations (even if licensed to different entities) as the "same licensee" for the purpose of measuring composite service contours. The Commission carry this notion forward, such that stations which are operated by licensees under substantially common ownership or as part of an integrated communications system are deemed to belong to "the same licensee" for the purpose of determining when an application proposes a license modification.

Fifth, existing Section 22.23(g) contains several important exceptions to the general rules on when an amendment is a major modification. While all these should be carried forward, the following are the most important:

- 22.23(g)(2): When "[t]he amendment resolves frequency conflicts with other pending applications but does not create new or increased frequency conflicts."
- 22.23(g)(3): When "[t]he amendment reflects only a change in ownership and control found by the Commission to be in the public interest...", i.e., as a result of granted transfer or assignment application to an existing authorization.

- 22.23(g)(4): When "[t]he amendment reflects only a change in ownership or control which results from [a settlement] agreement under §22.29 whereby two or more applicants ... join in one or more of the existing applications and request dismissal of their other application(s)...."

- 22.23(g)(6): When "[t]he amendment does not create new or increased frequency conflicts, and is demonstrably necessitated by events which the applicant could not have foreseen at the time of filing, such as, for example ... the loss of transmitter or receiver site...."

Subsections 22.23(g)(2) and 22.23(g)(4) are required be carried forward into CMRS regulation by Section 309(j)(6)(E) of the Communications Act, which imposes on the Commission the continuing:

> [O]bligation in the public interest to continue to use engineering solutions, negotiation, ... and other means in order to avoid mutual exclusivity in application and licensing proceedings....

Thus, the Commission carry each of those exceptions forward for all CMRS applications.

Sixth, the Commission should continue to apply the existing practice with respect to Part 22 applications which permits two applicants to consent to accept harmful electrical interference which otherwise would render their applications mutually exclusive. This practice is also required by Section 309(j)(6)(E) of the Communications Act. A similar practice exists with respect to Part-90 800 MHz applicants and licensees, for whom the Commission will accept short-spacing by consent.

II. THE COMMISSION SHOULD MAKE "FINDER'S PREFERENCES" APPLICABLE TO ALL CMRS LICENSES.

Paragraph 117-118 of the FNPRM seek comment on the procedures to be followed in accepting petitions to deny CMRS applications. Similarly, paragraphs 119-128 of the FNPRM seek comment of the Commission's procedures to be followed for the acceptance of mutually exclusive CMRS applications. However, the FNPRM is silent on the issue of adopting the "finder's preference" procedures generally for CMRS authorizations.

The Commission currently obtains the assistance of private parties to enforce Part 90 of its Rules by making authorizations issued under Part 90 subject to finder's preferences. Additionally, in the Part 22 Rewrite Notice the Commission proposed to expand this program to licenses issued under Part 22 of the Rules. Under this enforcement mechanism, the Commission grant finder's preferences to interested parties who provide information to the Commission that an authorized channel licensed under Part 22 is in fact not being used. If the Commission were to cancel the affected authorization, the finder's application would be deemed the "first-filed for this channel."[10/] With first-come, first-served licensing, this preference would result in the finder receiving the reclaimed license without being subject to mutually exclusive applications.[11/]

[10/] Part 22 Rewrite Notice, supra, 7 FCC Rcd at 3660.

[11/] Of course, if the Commission were to use filing windows, rather than first-come first-serve licensing, the Commission would be required to make the finder's preference dispositive.

Without doubt, the finder's preference procedures serve the public interest. They result in the Commission receiving information as to the real-world, localized status of its licensed channels which are being warehoused or otherwise unused. SSI supports the expansion of finder's preferences to all CMRS licenses.

CONCLUSION

Accordingly, SMR Systems Inc. respectfully requests that the Commission adopt its proposed definitions of "Major Modification" and "Modification to Authorization" with the important changes described herein and that the Commission make finders preferences applicable to all CMRS licenses.

Respectfully submitted,

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